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Supreme Court, U.S.
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No. 97-1631

In The

Supreme Court of the United States

October Term, 1997

CAROLYN JOYCE WINDHAM,

Petitioner,

vs.

THE CITY OF LOWELL, ARKANSAS; WILLIAM JAMES KRUSE, police officer, Individually and in his Official Capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review the Eighth Circuit Court of Appeals' finding that petitioner failed to allege sufficient facts upon which to base her claim of a substantive due process violation?

PARTIES TO THE PROCEEDING

The petition correctly identifies all parties to the proceeding.

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STATEMENT OF THE CASE

William Kruse, a respondent in this case, was first certified as a police officer in 1981. On the afternoon of April 13, 1995, there were two police officers on duty in the City of Lowell, Arkansas. The first, Chief of Police David Harmon, was on patrol. The second, Kruse, was at the police station.

At approximately 2:04 p.m. the Benton County Police dispatcher reported an automobile theft in the City of Lowell. Immediately thereafter, also at 2:04 p.m., Chief Harmon clocked a vehicle on radar traveling southbound on Highway 71B at 76 miles an hour in a 45-mile-per-hour zone. Keith Allen Mey was the driver of the speeding vehicle.

Harmon pulled behind Mey and activated his flashing blue lights. Mey accelerated in an attempt to escape. At 2:05 p.m. Harmon radioed a description of the Mey vehicle and its license plate number to the police dispatcher and indicated that he was in pursuit. The license tag on the Mey vehicle was not registered to the vehicle that Mey was driving.

Respondent Kruse heard the radio traffic between Harmon and the dispatcher. From the 2:04 p.m. call regarding a stolen car, and Harmon's 2:04 p.m. report that he was in pursuit, along with the fact that Mey's license plate was not registered to the vehicle that he was driving, Kruse believed that Harmon was in pursuit of a stolen car. He immediately ran to his police car, turned on his lights and siren, and drove to assist Harmon. Chief Harmon testified that Kruse left the police station to help him because police officers in a small city, without designated backup, rely on the nearest officer for assistance.

As the police officers were pursuing Mey, Carolyn Windham was preparing to turn right onto Highway 71B from

an adjoining street in Springdale, Arkansas, which is a neighboring City to the City of Lowell. Her granddaughter, a passenger in her vehicle, saw the Mey vehicle traveling south and told the petitioner that a "crazy" person had turned on a cross street at a high rate of speed. Then, as the petitioner attempted to enter Highway 71B, which runs into the City of Lowell, she hit her brakes as Chief Harmon passed her with his lights and siren activated in pursuit of Mey. Windham then traveled north on Highway 71B for a short distance and entered the center turn lane in preparation for a left turn onto Wagon Wheel Road, which intersects Highway 71B.

As Windham was traveling north on Highway 71B, Officer Kruse was traveling south, on the same highway, behind Harmon. Officer Kruse, with the flashing lights and siren activated on his police car, came upon traffic in both south bound lanes in the area of Wagon Wheel Road that did not yield to his police vehicle. He pulled into the center turn lane to pass the unyielding vehicles and made almost immediate contact with the petitioner's vehicle. The center turn lane on Highway 71B runs unimpeded and straight for the entire path of the pursuit. Kruse's estimated speed at impact was 35-miles-per-hour. Kruse reported the accident in a radio dispatch at 2:10 p.m.

At 2:11 p.m., Chief Harmon learned that the City of Springdale had three police cars ahead of him prepared to pursue Mey, so he radioed that he was "backing off". He then stayed back and allowed the Springdale Police Department to command the pursuit. Mey ran a roadblock, but was eventually apprehended by police officers from Springdale, and Harmon, at a second road block. Mey was charged with possession of a controlled substance, driving under the influence of a controlled substance, vehicular flight from a police officer (by both police departments), fictitious vehicle license, reckless driving,

speeding, and driving without a license. The Lowell Police officers were in charge of Mey's pursuit for approximately seven minutes, from the moment that Chief Harmon clocked Mey on radar until he turned over the pursuit to the neighboring city of Springdale. The radio log shows that Officer Kruse was only involved in the pursuit for approximately two minutes.

The Kruse-Windham accident was investigated by the Arkansas State Police. The point of impact of the two vehicles was 67 feet south of the Wagon Wheel Road intersection. Wagon Wheel Road is the street onto which Windham was preparing to turn. Both Kruse and Windham were injured in the accident and transported directly to the hospital.

Windham acknowledged that Officer Kruse did not intentionally try to stop her or injure her in the collision. Windham stated that the collision was a result of "a misconception on both parts", and when asked what caused the wreck, she said, "I just think it was a chain of events that took place in everyday life." It is therefore undisputed that the collision was accidental.

Windham first filed suit against her uninsured motorist carrier, American National Insurance Company, claiming that Mey's actions caused her injuries. Windham later initiated this suit against the City of Lowell and William Kruse for violating her Fourteenth Amendment right of due process. The District Court found as a matter of law that "[t]he level of culpability of the defendants simply is not sufficient to turn this state tort action into a federal case."

The Eighth Circuit affirmed the District Court's holding. The Eighth Circuit noted that "gross negligence" does not implicate the due process clause, and it stated that "Kruse's actions fail as a matter of law to constitute a denial of substantive due process."

A. The petition omits relevant state statutes.

Petitioner makes reference only to the general "rules of the road" which all civilian drivers are required to follow in support of her argument that respondents violated her civil rights. She fails to acknowledge the statutes that allow emergency vehicles, such as respondents' police car, to contravene the general rules of the road. Emergency vehicles are allowed to proceed through red lights and stop signs, and they are allowed to exceed speed limits. Ark. Code Ann. § 27-49-109; Ark. Code Ann. § 27-51-202. Also, under Arkansas law, civilian drivers have a duty to yield the right-of-way to an approaching emergency vehicle that has engaged its flashing lights and/or siren. Ark. Code Ann. § 27-51-901. These state statues are relevant to determine the level of Officer Kruse's culpability.

B. The petition misrepresents facts.

The petition incorrectly states that Kruse drove to assist Harmon *and* Bowman. However, the record below shows that Bowman was not involved in the pursuit when Kruse left to assist Harmon. Bowman was at a meeting in Springdale, Arkansas and happened to hear on the radio that the pursuit was headed his direction, which means that Kruse was the only City of Lowell officer available to assist Harmon. When Kruse left the station to help Harmon, he did not know if the Springdale Police had joined the pursuit to aid Harmon. Bowman reported that he was available for the pursuit at 2:12 p.m. and was advised by Chief Harmon to check on Kruse instead.

The petition also misrepresents the pursuit as "strictly misdemeanor". However, the record demonstrates that Kruse believed that the suspect may have been driving a stolen car.

C. Respondents object to consideration of any statements made by petitioner's "accident reconstructionist".

Petitioner makes reference to legal and factual conclusions attributed to an "accident reconstructionist". This "expert witness" merely provided an unsworn letter stating his opinions, after Kruse and the City of Lowell requested summary judgment at the District Court level. He was not qualified as an expert under Rule 702, FRE. There is no support for Windham's claim that he was qualified to testify about police pursuits, use of police vehicles, etc., which are not necessarily subjects of common knowledge. His letter claims to be based on a "preliminary investigation", with no indication as to his methods used, his source of facts, or materials. There is nothing in his letter to prove that he is competent to testify to the opinions stated, so his testimony was not admissible, as required by Rule 56, FRCP for consideration by the court. Nor was his "testimony" submitted by sworn affidavit as required by Rule 56(e), FRCP. Since he was not qualified as an expert, and he did not submit sworn, admissible testimony, all of his statements must be excluded from consideration.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONER FAILED TO STATE SUFFICIENT FACTS TO SUPPORT A FEDERAL CAUSE OF ACTION.

This case was determined based on the facts as alleged by the petitioner. The courts below properly stated the rule of law governing the case and there is no compelling reason for this Court to review the circuit court's decision.

While the Eighth Circuit has not stated the exact level of culpability that is required of a state actor in order to support a due process claim brought under 42 U.S.C. § 1983 in a police pursuit case, it is clear that more than "gross negligence" is necessary. *Myers v. Morris*, 810 F.2d 1437, 1468 (8th Cir. 1987), *cert. denied*, 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58 (1987). The District Court for the Western District of Arkansas, following the lead of several circuits, determined below that the "shocks the conscience" standard is the appropriate measure in these cases. *Citing Parton v. City of Bentonville*, 901 F. Supp. 1440, 1443-44 (W.D. Ark. 1995). (*See also Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994); *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991); *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996)).

Petitioner argues that the District Court and the Eighth Circuit should have applied the "deliberate indifference" standard. However, petitioner fails to show that the application of such a standard would have allowed her case to proceed to trial based on these facts. The courts below found that the facts alleged by Petitioner merely supported a claim for negligence or gross negligence on the part of respondent Kruse. Petitioner does not ask this Court to determine that negligence or gross negligence are sufficient to support a claim for a due process violation, and therefore there is no reason for this Court to review the lower court's decision.

The Eight Circuit's decision in this case is not in conflict with the decision of the other federal circuits. In this case, the Eighth Circuit declined to articulate what level of culpability is required to support a due process claim in a police chase case and simply stated that gross negligence is insufficient, which is consistent with the decisions from the other circuits.

The First Circuit Court noted in *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996), that the "shocks the conscience" test, which

requires a higher level of culpability than "gross negligence", is particularly appropriate to measure police pursuits". *Id.* at 1038. The First Circuit based its decision on the need to allow law enforcement officers to perform their jobs.

> Police chases are not only a necessary concomitant of maintaining order in our modern society, but they are also inherently hazardous. By their very nature, they inevitably create some risk of injury to bystanders. Officers must decide the balance between law enforcement and the risk of injury to public safety quickly and while under considerable pressure. In such circumstances, permitting the Due Process Clause to serve as a surrogate for state tort law would hamstring the police in their performance of vital duties.

Evans, 100 F.3d at 1038.

In adopting the "shocks the conscience" standard, the District Court in this case relied in part on this Court's unwillingness to allow the due process clause to become a tort law "to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976). It also looked to the Eighth Circuit's refusal to expand constitutional tort liability in *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 734 (8th Cir. 1993). Even if Petitioner terms the police negligence as "reckless and wanton", she is still bringing an action for tort. *Apodaca v. Rio Arriba County Sheriff's Dep't*, 905 F.2d 1445, 1446-47, n.3 (10th Cir. 1990).

The conduct alleged in this case falls short of the "gross negligence" standard, for a police officer, let alone the "shocks the conscience" test. William Kruse did not do anything

"shocking" in this case. He was the only officer available to assist Chief Harmon. Police officers in a small city must rely on the nearest fellow officer for assistance. The police dispatcher reported a stolen vehicle just as Chief Harmon became involved in a pursuit with a suspect whose license plate did not match his vehicle who accelerated when Harmon attempted to make a stop.

The pursuit occurred during daylight, and Officer Kruse used his emergency lights and siren. When some vehicles failed to yield to Kruse's police car, as required by Arkansas law, he attempted to pass in a turn lane that is straight, and free of any medians or other obstructions. *See* Ark. Code Ann. § 27-51-901. Kruse's involvement in the pursuit lasted approximately two minutes. Chief Harmon turned over control of the pursuit to the City of Springdale police as soon as they were able to provide sufficient officers, which was after only seven minutes of involvement.

Even if Windham's allegations are assumed to be true, the complaint was properly dismissed because the alleged conduct on behalf of William Kruse is insufficient to support a due process claim under 42 U.S.C. § 1983. Windham merely alleged that Officer Kruse was "in route to join an ongoing pursuit . . ."; that in order to pass vehicles on the left, Officer Kruse entered the center turn lane; that due to a hill, Officer Kruse was unable to see that Windham's vehicle was stopped in the center turn lane waiting to make a left-hand turn; and that Officer Kruse was unable to avoid colliding with the Windham's vehicle due to traffic in all other lanes. Therefore, Windham alleged that Kruse was *negligent* or *reckless* in his decision to enter the center turn lane. None of Petitioner's allegations prove that a due process violation occurred.

Windham's allegations are less egregious than those from a multitude of police crash cases in which courts have found that

summary judgment for the officer was proper. In *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294 (8th Cir. 1989), a police officer attempted to stop a suspect driving a car with license plates that did not match the vehicle. The suspect fled and the officer pursued beyond his city's limits. While in pursuit, the police officer lost control of his vehicle and collided head-on with the plaintiff. The plaintiff in *Roach* claimed that the officer's conduct was sufficient to shock the conscience. The Eighth Circuit found that the officer's conduct did not even satisfy the gross negligence test and fell short of the level necessary to sustain a due process claim under § 1983. *Id.* at 297.

The plaintiff in *Temkin v. Frederick County Com'rs*, 945 F.2d 716 (4th Cir. 1991), brought suit for a due process violation after being struck by a suspect fleeing from the police. The suspect spun his wheels outside a gas station and then fled from the deputy who attempted to stop him. The deputy chased the suspect at night at speeds of over 105 miles per hour on a narrow two-lane road. The deputy continued the chase into an area in which a carnival was being held and cars were parked on both sides of the street. Both the suspect and the deputy eventually lost control of their vehicles and the deputy's car struck the plaintiff's at a speed of around 60 miles per hour. The Fourth Circuit affirmed summary judgment in favor of the defendants holding that the deputy's alleged conduct fell short of the "shocks the conscience" standard. *Id.* at 723.

The court in *Temkin* noted consistent decisions nationwide, such as *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). In *Taylor*, a police officer responding to an emergency call in Georgia drove at 46 miles per hour in a 30-mile-per-hour zone. Under Georgia law, police vehicles were only allowed to exceed posted speed limits when responding to emergency calls if the officer used the vehicle's flashing lights and siren. The officer

in *Taylor* used neither, and his vehicle struck the plaintiff's as she passed through an intersection. The court found the officer's conduct insufficient to raise a fact issue on the plaintiff's due process claim. *Id.* at 950.

The defendant police officer in *Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445 (10th Cir. 1990), was assumed to have been driving at between 55-65 miles per hour around a blind curve in a 35-mile-per-hour-zone. He was not using his emergency lights or siren; it was after midnight; and it had been raining and sleeting. The officer's car collided with the plaintiff's, broadside, as she was leaving the parking lot of a restaurant. The court found these facts insufficient to support a federal cause of action. *Id.* at 1447. *See also Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987) [pursuit at 120-135 miles per hour in traffic did not constitute "gross negligence"].

When measured against the conduct alleged in *Roach, supra*; *Temkin, supra*; *Apodaca, supra*; *Sherrill, supra*; and *Taylor, supra,* it is apparent that Windham's allegations do not support a claim for a due process violation. Windham has merely stated a claim for negligence. Petitioner cannot find a case from *any* Circuit, applying *any* standard in which facts similar to those she alleged have been sufficient to support a due process violation.

Windham urges this Court to adopt the "deliberate indifference" test for culpability. As discussed above, the "shocks the conscience" standard is based on the realities of police work. *See Evans, supra.* In almost every case involving a pursuing police officer's crash with a bystander, the bystander can claim that the officer deliberately exceeded the speed limit or violated another traffic rule. Applying the "deliberate indifference" standard could easily make every act of driving negligence by a police officer a federal case, which makes the "shocks the conscience" test preferable in these cases.

Even if this Court adopts the deliberate indifference standard, the lower court's decision should stand. Petitioner defines the deliberate indifference standard as

> requiring a plaintiff to allege facts that, if proven, would show that the law enforcement officer acted with deliberate indifference if he knew of a risk that was so great that it was highly probable that harm would follow and he still proceeded with unreasonable disregard of the probable harm.

Citing Medina v. City and County of Denver, 960 F.2d 1493, 1496 (1992).

The problem with petitioner's argument that William Kruse was deliberately indifferent in this case is that Officer Kruse was also injured in the accident. By his alleged "oppressive use of force" he put himself in the hospital, an act which it defies logic to believe was "malicious" as argued by Windham. Her argument is also contrary to her own statement that the accident was unintended. In arguing that Kruse was deliberately indifferent, she is claiming that Kruse knew that it was highly probable that he would injure himself in the accident, but that he proceeded to act in a manner that would bring about that harm to himself as well as to Windham. There is no evidence that he knew that his injuries, or Windham's were highly probable; he was merely negligent.

William Kruse, as a law enforcement officer in the State of Arkansas, had the right to reasonably contravene the rules of the road in his pursuit of Mey. If he acted in a manner that was more reckless than a reasonable police officer would have acted, Windham's remedy lies in a state tort claim. *See City of Little Rock v. Weber*, 298 Ark. 382, 767 S.W.2d 529 (1989). The mere fact that a police officer may have been negligent does not somehow elevate the tort claim to a civil rights violation.

II.

ANY CONFLICT IN THE CIRCUIT COURTS DOES NOT ALTER THE OUTCOME OF THIS CASE.

This Court has already heard argument in the case of *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir.1996), *cert. granted,* 1997. In deciding *Lewis*, this Court will have the opportunity to resolve any conflict between the standards currently being applied in the Circuit Courts. The outcome of *Lewis*, will not affect petitioner's claim however.

In *Lewis*, the Ninth Circuit acknowledged that "bare" gross negligence is never sufficient to sustain a § 1983 claim for a substantive due process violation. *Id.* at 440. It determined that a higher level of culpability was necessary based on this Court's holding in the case of *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

Citing *City of Canton*, the Ninth Circuit in *Lewis* established the "deliberate indifference" standard in police chase cases. Based on the particular facts presented in *Lewis*, the court held that a fact question was presented as to whether or not the police conduct met that standard.

As the court noted in *Lewis*, no Federal Circuit Court has found that negligent conduct can form the basis of a § 1983 due process violation. *Id.* at 439, n.5. Petitioner does not urge this Court to decide that negligent conduct is a sufficient basis for such a claim. The courts below determined that the facts in this case only establish negligence. Therefore, petitioner's claim is insupportable under any standard either currently in use or proposed by any circuit court and there is no reason for this Court to review the decision below.

CONCLUSION

The lower courts dismissed this case based on the particular facts presented by Petitioner. The facts of this case do not support a due process claim under any of the current or proposed standards of culpability. This Court does not need to grant review of this case in order to resolve a conflict between the circuit courts. Therefore, there is no compelling reason for this Court to review this case and the petition for a writ of certiorari must be denied.

Respectfully submitted,

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